Supreme Court, U.S.
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No. 01-584

In The

Supreme Court of the United States

WANDA ADAMS, LEO L. FLOYD, *et al.*,

Petitioners,

v.

FLORIDA POWER CORPORATION and FLORIDA PROGRESS CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITIONERS' REPLY MEMORANDUM

Of counsel:

EDWARD L. SCOTT
409 Southeast Fort King Street
Ocala, Florida 34471

SCOTT CHARLTON
CLARK, CHARLTON & MARTINO, P.A.
3407 West Kennedy Boulevard
Tampa, Florida 33623

JOHN G. CRABTREE
Counsel of Record

THOMAS M. PFLAUM
JOHN G. CRABTREE, P.A.
240 Crandon Boulevard
Suite 279
Key Biscayne, Florida 33149
(305) 423-4350
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. THIS CASE PRESENTS AN OUTSTANDING VEHICLE FOR RESOLVING THE CIRCUIT SPLIT

The court of appeals was quite clear in answering the certified "controlling issue of law in the case" (Pet. 2a): There is no such thing as an ADEA disparate impact cause of action within the Eleventh Circuit. The matter cannot be revisited by the district court because the district court cannot violate the mandate of the Eleventh Circuit. Thus, the disparate impact record will *not* further develop with the passage of time. The matter is as final as it's going to get.

Florida Power nonetheless argues that this case is not appropriate for the Court's review because the matter is, technically at least, interlocutory. Brief in Opp., pp. 5-8. In a memorandum joined by Chief Justice Rehnquist and Justice O'Connor, Justice White once aptly wrote:

> "Where there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review." This is such a case.[1]

This, too, is such a case.

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[1] *Randolph Cent. School Dist. v. Aldrich*, 506 U.S. 965 (1992) (White, J., dissenting) (quoting *Michael v. United States*, 454 U.S. 950, 951 (1981) (White, J., dissenting from denial of certiorari); and citing *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945); *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Land v. Dollar*, 330 U.S. 731, 734, n.2, (1947); *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 685, n.3 (1949); R. Stern, E. Gressman & S. Shapiro, SUPREME COURT PRACTICE 225 (6th ed. 1986)).

The petitioners agree with Florida Power that "[f]ollowing *Hazen Paper* [*Co. v. Biggins*, 507 U.S. 604 (1993)], three circuits—the Second, the Eighth, and the Ninth—have continued to recognize disparate impact claims under the ADEA." Brief in Opp., p. 10. Florida Power quibbles that the three circuits that recognize disparate impact liability under the ADEA have not "analyzed *anew* whether such claims are properly recognized" after *Hazen Paper*. Brief in Opp., p. 10 (emphasis added). The company concedes, however, that the circuits have "chosen" to follow their pre-*Hazen Paper* precedent. *Ibid*. There is no need for further analysis where a circuit court is not breaking from its established precedent, and the Second, the Eighth, and the Ninth Circuits have *elected* to adhere to their precedent. With the passing of the eight-year anniversary of *Hazen Paper*, it is clear that the circuit conflict is not going away on its own.

Since four circuits do not recognize disparate impact claims under the ADEA, a 4-3 conflict in the circuits on a controlling issue of federal discrimination law certainly indicates that the question presented is "important." *See* Pet., pp. 22-24. The question is also "clear-cut," since the Eleventh Circuit answered it absolutely. (Pet. 2a n.1). And there is no legitimate dispute whether the resolution of the question presented is fundamental to the further conduct of the case. The entire nature of a case involving 117 people has changed so that each must now proceed only with individual claims on the basis of disparate treatment.

Florida Power notes that the district court's ruling on the question presented arose in the context of a class decertification ruling and urges that the petitioners "may

be able to pursue their claims no matter what happens on the decertification motion." Brief in Opp., p. 8. Not so. The petitioners will *not* be able to pursue their disparate impact claims. Such claims have been excised not only from the case, but also from the entire Eleventh Circuit.[2]

Florida Power also suggests that the petitioners failed to *allege* disparate impact under the ADEA. Brief in Opp., 6. It is a bit disingenuous, however, for the company to argue simultaneously that there is no such thing as disparate impact *and* that the petitioners' did not adequately allege it. While the nature of disparate impact under the ADEA will not be known before the Court rules, the allegations in the complaint identified by Florida Power are certainly adequate to satisfy the standards for notice pleading.[3]

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[2] The fact that the issue arose on class certification is itself inconsequential to the Court's consideration of certiorari. The question presented is whether disparate impact is available under the ADEA. That question of law would have arisen in the district court at the summary judgment stage of the proceedings if it had not arisen during Florida Power's class decertification motion.

[3] The complaint alleges that the practice of the company's "reduction-in-force" had a "disproportionate impact on older employees." Sixth Amended Complaint ¶36. Florida Power cites *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988) (O'Connor, J.) (plurality op.), for the proposition that the petitioners needed to identify an employment practice that adversely impacted older workers with heightened specificity. *Watson* was concerned with a party's prima facie evidentiary burden—not its burden of pleading. Ironically, *Watson* held that a disparate impact claim may indeed proceed based upon the fact that an employer committed employment decisions to the subjective discretion of supervisors—a circumstance that exists

Florida Power has not advanced a single argument that bears upon this Court's ability to resolve cogently through this case whether disparate impact is available under the ADEA. The petition should be granted so that the Court may resolve whether a plaintiff may assert an ADEA claim based upon disparate impact and, if so, under what conditions.

II. THE COURT OF APPEALS' RULING ON THE MERITS UNDERSCORES THE NEED FOR REVIEW

The petition briefly explains why the Eleventh Circuit's decision—that the ADEA does not permit disparate impact analysis under any circumstances—is erroneous. Pet., pp. 16-22. Florida Power, of course, argues that the decision is correct. Brief in Opp., pp. 12-14. The petition and the response reveal the parties' drastically different understanding of the law. If the Court grants review, there will be time enough to reply to Florida Power's arguments in detail. For present purposes, however, the depth of the parties' disagreement on the merits—which

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in this case. Defendants' Opposition to Plaintiffs' Petition for Permission to Appeal, dated November 17, 1999 at 3-4 (on file with the Eleventh Circuit); Declaration of David L. Miller ¶¶24-30; Doc. 229-9 at pp. 9-12, 21-22.

mirrors the deep division among the circuit courts—only underscores the need for review.

Respectfully submitted,

Of counsel:

EDWARD L. SCOTT
409 Southeast Fort King Street
Ocala, Florida 34471

SCOTT CHARLTON
CLARK, CHARLTON & MARTINO, P.A.
3407 West Kennedy Boulevard
Tampa, Florida 33623

JOHN G. CRABTREE
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THOMAS M. PFLAUM
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240 Crandon Boulevard
Suite 279
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(305) 423-4350
Counsel for Petitioners

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